IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 12/01/2004

CORAM

THE HONOURABLE MR.JUSTICE P.D.DINAKARAN
AND
THE HONOURABLE MR.JUSTICE C.NAGAPPAN

Crl.A.No.1397 of 2003

1.Madurai Ganesan
2.Alagusundram
3.Ganesamoorthy
4.Veera. Ilavarasan
5.Boominathan
6.P.S.Maniam
7.Sivanthiappan
8.Nagarajan .. Appellants

-Vs-

The State of Tamilnadu rep.
by Deputy Superintendent of Police
'Q' Branch C.I.D.
Kalaimagal Nagar
Madurai-625 017. .. Respondent

PRAYER: Against the order of the Special Court under Prevention of Terrorism Act, Poonamalle, Chennai-600 056 refusing bail made in Crl.M.P.No.68 of 2003 in Special C.C.No.1 of 2003, dated 10.9.2003.

!For Appellants : Mr.K.S.Dinakaran

^For Respondent : Mr.N.R.Chandran
Advocate General
Assisted by Mr.K.Jayakumar
Government Advocate

:JUDGMENT

P.D.DINAKARAN,J.

"Liberty is the product, not of institutions,
but of a temper, of an attitude towards life.
It is idle to look to laws, or Courts, or

principalities, or power, to secure it."

says Judge Hand while writing on Sources of Tolerance in his "Spirit of Liberty".

2. The operational zone of custodial law pending trial into the charges framed against the appellants/accused under the provisions of the Prevention of Terrorism Act, 2002 (for brevity "the POTA"), the refusal of bail to them, the resultant consequences and their entitlement to bail are, in brief, the issues raised for our consideration in this appeal.

3. This Criminal Appeal is directed against the order dated 10.09.2003 in Crl.M.P.No.68 of 2003 in Spl.C.C.No.1 of 2003 on the file of Special Court, Poonamallee, Chennai - 56 (Specially constituted under the Prevention of Terrorism Act) refusing to grant bail to the appellants herein.

4.1. The short resume of facts relevant for determination of the questions raised may be stated thus:

The appellants, viz., the accused Nos.2 to 9 in Spl.C.C.No.1 of 2003 on the file of Special Court, Poonamallee, Chennai - 56, are facing the charges under Sections 21(2)(a) and 21(3) of the POTA with reference to a public meeting conducted on 29.06.2002 between 08.45 p.m. and 11.30 p.m. at Thirumangalam, Madurai, addressing in support of a terrorist organisation viz., Liberation Tigers of Tamil Ealam (for brevity "LTTE").

4.2. It is a matter of record that the appellants were arrested on 09.07.2002 in Crime No.280 of 2002 on the file of Thirumangalam Police Station, Madurai District in connection with the occurrence said to have been taken place on 29.06.2002 at Thirumangalam, referred to above, and remanded on the same day.

4.3. The Special Court was constituted under the POTA on 29.07.2002 and the case was transferred from learned Judicial Magistrate, Thirumangalam to the Special Court, Poonamallee on 01.08.2002. Thereafter, the appellants were produced before the Special Court on 04.10.2002 and their remand was extended from time to time till the final report, supported with the statement of 115 prosecution witnesses, was filed on 30.12.2002, charging the appellants for the offences punishable under Sections 21(2)(a) and 21(3) of the POTA.

4.4. The Special Court took cognizance of the commission of the offences on 02.01.2003 and the copies of the final report and the statement of the witnesses were served on the appellants on 13.01.2003.

4.5. The appellants filed applications for discharging them from the said charges on 17.03.2003 and the same were dismissed by the Special Court by an order dated 16.07.2003 and thereafter, the Special Court framed the charges against the appellants and one Thiru. Vaiko (who is not before us) on 25.07.2003 for the offences punishable under Sections 21(2)(a) and 21(3) of the POTA.

4.6. The appellants, thereafter, moved the Special Court in Crl.M.P.No.68 of 2003 seeking bail. However, the same was stoutly objected by the State.

4.7. The learned Special Judge, in his detailed order dated 10.9.2003 in Crl.M.P.No.68 of 2003 in Spl.C.C.No.1 of 2003, refused to grant bail to the appellants for the following reasons:
(i)if the appellants are released, there is every possibility for tampering public witnesses as the appellants are influenced persons belonging to a political party;
(ii)in view of the status of the appellants there is every possibility that the appellants would tamper the witnesses;
(iii)since the charges were very grave and severe in nature and the same were framed by the Special Court after having been prima facie satisfied with the materials available on record, the appellants are not entitled for bail;
(iv)there is every possibility that the appellants would commit the very same offence once again;
(v)the learned public prosecutor assures for examination of prosecution witnesses if the appellants co-operate for a speedy trial;
(vi)if the appellants tamper witnesses or indulge in such crimes, the damage occasioned would be irretrievable; and
(vii)the status and the placement of the appellants in the society cannot be a guiding factor for granting bail and the same is an irrelevant consideration.

4.8. Hence, the present appeal.

4.9. Admittedly, the trial commenced on 21.8.2003 and the examination and cross-examination of P.Ws.1 to 5 were completed and the crossexamination of P.W.6 is continuing as on date.

5.Mr.K.S.Dinakaran, learned counsel for the appellants, in support of the appeal, contends that the appellants are entitled for bail on the following grounds:

(i)since the charges are already framed against the appellants and the prosecution has also filed the list of witnesses proposed to be examined, there is no necessity to keep the appellants under judicial custody;
(ii)the appellants are not charged for any offence relating to the execution or commission of any terrorist act, nor for threatening or striking terror in the public, nor for facilitating the commission of any terrorist act, as admittedly, the arrangement of public meeting and the public speech made in the said meeting are alone the basis for the charge sheet, which, by itself, would not be sufficient to attract Sections 21(2)(a) and 21(3) of the POTA unless and until there are materials to substantiate the element of mens rea in such public speech. In this regard, reliance was placed on the decision of the Apex Court in PEOPLE'S UNION FOR CIVIL LIBERTIES & ANOTHERS Vs. UNION OF INDIA (W.P.(C) No.389/2002, judgment dated 16.12.2003) as well as on the other decisions of the Apex Court referred to therein;
(iii)the speeches delivered by the appellants 1 to 3 and Thiru Vaiko (who is not before us), in the entire context of the surrounding circumstances, does not prima facie attract Sections 21 of the POTA and therefore, the reason that

the appellants are not entitled for bail in view of the grave nature of offence is not tenable in law;
(iv)there is no possibility for tampering the prosecution witnesses, because 82 out of 115 prosecution witnesses are police officers and government servants, on whom the appellants do not have any influence;
(v)the statement obtained under Section 164 of Cr.P.C., for filing final report itself cannot be the basis for refusing the bail, particularly when the same are not sufficient to constitute the offence charged, in view of the decision of the Apex Court in PEOPLE'S UNION FOR CIVIL LIBERTIES & ANOTHERS Vs. UNION OF INDIA (W.P.(C) No.389/2002, judgment dated 16.12.2003) which is also followed by a Division Bench of this Court in P.NEDUMARAN & OTHERS Vs. STATE REP. BY DEPUTY SUPERINTENDENT OF POLICE, 'Q' BRANCH CID, CHENNAI (Order dated 18.12.2003 in Crl.A.Nos.749 to 752 of 2003 and batch cases) arising under identical facts and circumstances;
(vi)in view of the ratio laid by the Apex Court in PEOPLE'S UNION FOR CIVIL LIBERTIES case (cited supra), the materials relied upon by the prosecution are not sufficient to constitute the offences punishable under Sections 21(2)(a) and 21(3) of the POTA and therefore, bail cannot be refused to the appellants on the ground that there is every possibility for the appellants committing the very same offence;
(vii)the appellants are charged for the said offences only for the first time;
(viii)since the appellants are permanent residents of the State of Tamil Nadu, owning immovable properties, there is no likelihood for them to abscond; and
(ix)in any event, the appellants are entitled to bail to instruct their counsel effectively to defend their case.

6. Per contra, Mr. N.R.Chandran, learned Advocate General appearing for the State of Tamil Nadu by highlighting the reasons given by the Special Judge, objects the grant of bail to the appellants on the following grounds:
i.since the appellants are active members of a political party viz., MDMK, a radical chauvinist organisation which supports LTTE in India, there is every chance for tampering the prosecution witnesses. In this regard reliance is placed on STATE Vs. JASPAL SINGH GILL reported in AIR 1984 SC 1503;
ii.as the trial has already commenced and is in progress, there is no necessity to enlarge the appellants on bail;
iii.if anyone of the appellants absconds or fails to appear, the trial could not be expeditiously completed;
iv.the appellants are attempting to protract the trial by resorting extensive cross-examination unnecessarily, which runs for several pages;
v.taking into consideration the facts and circumstances of the case, the status of parties, their previous conduct and their political influence, there is every possibility for the appellants to indulge in commission of similar offences under the provisions of the Act, if they are enlarged on bail; and
vi.the appellants, having filed applications before the Review Committee constituted under Section 60 of the POTA, challenging the proceedings initiated against them under the POTA, are not entitled to seek for bail in parallel proceedings.
vii.for the purpose of defending their case effectively, the appellants could be kept in Central Prison at Chennai, so that they could instruct their respective counsel at Chennai;

7. We have given our anxious consideration to the submissions made by the learned counsel for the appellants and learned Advocate General.

8. Bail or Jail, during the trial for the offences punishable under the provisions of the POTA, is the vital issue projected for our consideration.

9.1. The reasons stated by the Special Court for refusing bail to the appellants are required to be weighed and tested in the light of principles laid under the judicial pronouncements.

9.2. As held by the Apex Court in STATE OF MAHARASHTRA Vs. ANAND CHINTAMAN DIGHE reported in (1990) 1 SCC 397, (i) the serious nature of the offence; (ii) the character of evidence; (iii) circumstances which are peculiar to the accused; (iv) reasonable possibility of the presence of the accused not being secured at the trial; (v) reasonable apprehension of the witnesses being tampered with; (vi) larger interest of the public, are to be taken into consideration, while disposing the bail applications.

10. Ordinarily, the discretion of the lower court in granting or refusing bail would not be interfered. But, if the order suffers from irrelevant considerations, which are not supported with any material on record, there should not be any hesitation to interfere with such orders in order to meet the ends of justice.

11. While the appellants seek bail pointing out their incarceration in the judicial custody for more than 18 months, the respondent objects the same, highlighting the gravity of the offence and apprehending that they would tamper the prosecution witnesses or flee away from the trial causing great prejudice to the prosecuting agency, of course, placing reliance on the decision of the Apex Court in STATE Vs. JASPAL SINGH GILL reported in AIR 1984 SC 1503.

12. Considering the above rival pleas, we are obliged to scrutinize the reasons weighed by the Special Court for refusing bail cautiously, when such refusal of bail causes a serious embargo on the personal liberty of the appellants guaranteed under Article 21 of the Constitution of India, as they cannot be incarcerated in jail till the Special Court gives its verdict, acquitting them.

13. Article 21 of the Constitution of India guarantees the life with dignity. Undoubtedly, national security is of paramount importance. Without protecting the safety and security of the nation, individual rights cannot be protected. However, worth of nation is the worth of the individuals constituting it. Both national integrity as well as individual dignity are core values of the Constitution. It is, therefore, obligatory on the part of the Court to exercise its judicial discretion guided by law and desirable that the application for grant of bail is disposed of based on principles, but not merely on assumptions and presumptions much less on apprehensions, without

sufficient materials to constitute the offences charged.

14. No doubt, organised crimes and terrorist activities are closely inter linked. Terrorism has now acquired global dimension and become a challenge to the entire world. Finding that the existing criminal justice system is not designed to deal with heinous crimes relating to the terrorist activities, the legislature felt necessary to enact the POTA to make

provisions for preventing and dealing with, terrorist activities and matters connected therewith; and those who are entrusted with the administration are armed with the provisions to deal with such terrorist activities firmly.

15. Concededly, the appellants were charged for having held the public meeting at Thirumangalam, Madurai, on 29.06.2002 between 08.45 p. m. and 11.30 p.m. and for the public speech made therein, which according to the prosecution, constitutes offences punishable under Sections 21(2)(a) and 21(3) of the POTA.

16. In this regard, it is apt to refer the ratio laid down by the Apex Court in PEOPLE'S UNION FOR CIVIL LIBERTIES (referred supra), upholding the constitutional validity of Sections 20, 21 and 22 of the POTA, relevant portion of which reads as follows:
"Sections 20, 21 & 22:

Petitioners assailed Sections 20, 21 and 22 mainly on the ground that no requirement of mens rea for offences is provided in these Sections and the same is liable to misuse therefore it has to be declared unconstitutional. The Learned Attorney General argued that Section 2 1 and its various sub-sections are penal provisions and should be strictly construed both in their interpretation and application; that on a true interpretation of the Act having regard to the well settled principles of interpretation Section 21 would not cover any expression or activity which does not have the element or consequence of furthering or encouraging terrorist activity or facilitating its commission; that support per se or mere expression of sympathy or arrangement of a meeting which is not intended or designed and which does not have the effect to further the activities of any terrorist organization or the commission of terrorist acts are not within the mischief of Section 21 and hence is valid.

Here the only point to be considered is whether these Sections exclude mens rea element for constituting offences or not. At the outset it has to be noted that Sections 20, 21 and 22 of the POTA is similar to that of Sections 11, 12 and 15 of the Terrorism Act, 2000 of United Kingdom. Such provisions are found to be quite necessary all over the world in anti-terrorism efforts. Sections 20, 21 and 22 are penal in nature that demand strict construction. These provisions are a departure from the ordinary law since the said law was found to be inadequate and not sufficiently effective to deal with the threat of terrorism. Moreover, the crime referred to herein under the POTA is aggravated in nature. Hence special provisions are contemplated to combat the new threat of terrorism. Support either verbal or monetary, with a view to

nurture terrorism and terrorist activities is causing new challenges. Therefore Parliament finds that such support to terrorist organizations or terrorist activities need to be made punishable. Viewing the legislation in its totality it cannot be said that these provisions are obnoxious.

But the Petitioners apprehension regarding the absence of mens rea in these Sections and the possibility of consequent misuse needs our elucidation. It is the cardinal principle of criminal jurisprudence that mens rea element is necessary to constitute a crime. It is the general rule that a penal statute presupposes mens rea element. It will be excluded only if the legislature expressly postulate otherwise. It is in this context that this Court said in Kartar Singh V. State of Punjab, 1994 (3) SCC 569 (at page 645 para 115 of SCC) that:

"Unless a statue either expressly or by necessary implication rules out 'mens rea' in case of this kind, the element of mens rea must be read into the provision of the statute."

Mens rea by necessary implication could be excluded from a statue only where it is absolutely clear that the implementation of the object of the Statue would otherwise be defeated. Here we need to find out whether there are sufficient grounds for inferring that Parliament intended to exclude the general rule regarding mens rea element. (See: State of Maharashtra V. M H George, AIR 1965 SC 722, Nathulal V. State of MP, AIR 1966 SC 43, Inder Sain V. State of Punjab, (1973) 2 SCC 372, for the general principles concerning the exclusion or inclusion of mens rea element vis-`-vis a given statute). The prominent method of understanding the legislative intention, in a matter of this nature, is to see whether the substantive provisions of the Act requires mens rea element as a constituent ingredient for an offence. Offence under Section 3(1) of the POTA will be constituted only if it is done with an -'intent'. If Parliament stipulates that the 'terrorist act' itself has to be committed with the criminal intention, can it be said that a person who 'profess' (as under Section 20) or 'invites support' or 'arranges, manages, or assist in arranging or managing a meeting' or 'addresses a meeting' (as under Section 21) has committed the offence if he does not have an intention or design to further the activities of any terrorist organization or the commission of terrorist acts? We are clear that it is not. Therefore, it is obvious that the offence under Section 20 or 21 or 22 needs positive inference that a person has acted with intent of furthering or encouraging terrorist activity or facilitating its commission. In other words, these Sections are limited only to those activities that have the intent of encouraging or furthering or promoting or facilitating the commission of terrorist activities. If these Sections are understood in this way, there cannot be any misuse. With this clarification we uphold the constitutional validity of Sections 20, 21 and 22."
(Emphasis supplied)

17. A Division Bench of this Court in P.NEDUMARAN & OTHERS Vs. STATE REP. BY DEPUTY SUPERINTENDENT OF POLICE, 'Q' BRANCH CID, CHENNAI (Order dated 18.12.2003 in Crl.A.Nos.749 to 752 of 2003 and batch cases) filed against the refusal of bail to the appellants therein, which, concededly,

dealt with the charges relating to the offences punishable under Sections 21(2)(a) and 21(3) of the POTA, in respect of an alleged public speech by the appellants/accused therein in support of LTTE, as in the instant case, following the decision of the Apex Court in PEOPLE'S UNION FOR CIVIL LIBERTIES (referred supra), and held as follows:

"..

26. It is very seriously argued, therefore, that A-1 Pala Nedumaran is a leader, having formed an association, which has already been banned and the accused persons are his staunch supporters. Learned counsel for the appellant points out that barring the speeches, there is no overt act committed by the accused persons. He points out that the whole prosecution revolves around the speeches, which are made in the public meetings.

27. ... Learned Public Prosecutor had to suggest that there has been material on record to suggest that at least some of the accused persons have had nexus with the LTTE. There is nothing in the charge, however, on account of that nexus. Even if it is granted that there is some nexus, unless that nexus has resulted or is intended to result in a terrorist activity, it would be difficult to refuse bail to the accused persons. If the whole alleged criminal activity centres around only the speeches made in public meetings then, it will be for us to examine as to whether those speeches or any one of them is so inflammatory or so potent so as to result into a terrorist activity. We will not go into the merits of the matter at this stage for the simple reason that we are aware of our own limitations that the trial is still to take place and the case is in progress. We do not also wish to express anything as to whether those speeches per se could be spelt out any offence under Sec.21 of POTA. However, in the absence of any terrorist activity attributed to any of the accused persons, except delivering some speeches, it will be difficult to order the accused persons to remain behind the bars for more than seventeen months. It is an admitted positioin that the accused are incarcerated for the last seventeen months. ...

28. ....

29. Learned Public Prosecutor, however, expressed that if these accused persons are let out on bail, they are likely to repeat the offences on account of their ideology and philosophy. That by itself cannot be pressed into service as the accused persons could be bound by some conditions. Therefore, even the possibility of their committing the offence cannot by itself come in the way of their getting bail.

30. It cannot be forgotten that the offence under Section 21 the POTA is punishable with imprisonment for a term not exceeding ten years or with fine or with both. Therefore, this is not an offence where a jail sentence is a must. On the other hand, we have taken into consideration, the factor that all the accused person, i.e., A-1 to A-4 have been in detention for the last seventeen months. ... We are, therefore, of the opinion that accused 1 to 4 deserve to be enlarged on bail. We shall, however, pass the operative part of the order at the end of the judgment."

(emphasis supplied)

18. Even though the Court is obliged to take the following factors into consideration for granting bail, viz.,

(i)the accused may tamper the prosecution witnesses,

(ii)the nature and gravity of the circumstances in which the offence is committed;
(iii)the position and the status of the accused with reference to the victim and the witnesses;
(iv)the likelihood of the accused fleeing from justice; and
(v)of repeating the similar offence,
the said factors themselves cannot be taken into consideration in isolation, ignoring the well guided principles laid down by the Apex Court as well as by this Court referred to above in identical facts and circumstances of the case.

19. The contentions of the State that the appellants would tamper the prosecution witnesses, flee away from the trial and indulge themselves in similar offences, in our considered opinion, cannot be kept in an ivory tower, when the personal liberty of the appellants is in peril, as such apprehensions of the State could be taken care of by imposing appropriate conditions by the Court, while enlarging the appellants on bail.

20.1. That apart, we are unable to appreciate the contention of the learned Advocate General that the appellants are attempting to protract the trial by way of an extensive cross examination and therefore, they are not entitled to seek bail on the ground of delay in trial.

20.2. It is a settled proposition that an accused is entitled in law to put further questions to the prosecution witnesses by way of cross-examination, in spite of what he had stated in reply to questions put to him in cross-examination. Each accused is entitled in law to test the evidence given against him by a prosecution witness by crossexamination and such cross-examination need not be limited. Neither under the provisions of the Indian Evidence Act nor under the Code of Criminal Procedure, such right of the accused to cross-examine is barred, inasmuch as the basic concept underlined under the art of cross-examination is to uphold fair play in the conduct of trial into the criminal charges framed against the accused. Availing the opportunity of cross-examination at length and its fullest possibility, in our considered opinion, will not per se amount to protracting the proceedings of the trial as it is a powerful weapon available for the accused under trial, when the prosecution proposes to convert the veracity of the evidence from or testimony gathered behind their back.

20.3. The exhaustive but relevant cross examination of prosecution witnesses by the appellants cannot be said to be a prejudice to the conduct of the trial, as contended by the learned Advocate General, because, in order to resist the charges framed against them, the appellants/accused are entitled to have their own unimpaired right of cross-examination as an integral part of rule of natural justice in criminal jurisprudence. That apart, any attempt to protract the trial by lengthy cross-examination, if the same is irrelevant, could, in our considered opinion, be controlled effectively by the trial Judge, as provided under the procedural statutes. Hence, the contention of the learned Advocate General that the accused are attempting to protract the proceedings by way of lengthy cross-examination which runs to 159 pages in the case of P.W.1, 140 pages in the case P.W.2, 109 pages in the case of P.W.3, 71.5 pages in the case of P.W.4, 46 pages in the case of P.W.5 and 14 pages in

the case of P.W.6, in our considered opinion, lacks judicious sanctity.

21. Further, under the scheme of the Act, there is no bar for the appellants to seek bail merely because they have approached the Review Committee challenging the proceedings initiated under the provisions of the Act and therefore, their right to seek bail in law cannot be denied.

22. For all these reasons, we find that the learned Special Judge has got misdirected himself in refusing bail to the appellants for the reasons stated therein, which are unsustainable in law and do not stand to the test of principles laid down by the judicial pronouncements referred to above.

23. Hence, we are inclined to set aside the order of the learned Special Judge dated 10.9.2003 made in Crl.M.P.No.68 of 2003 in Special C.C.No.1 of 2003 and enlarge the appellants on bail, on the following conditions:

(i) they shall be released on bail on their executing a bond for a sum of Rs.50,000/- (Rupees fifty thousand only) each, with two sureties each for the like sum, to the satisfaction of the trial Court;
(ii) they shall not refer any terrorist organizations, more particularly LTTE, or their activities either directly or indirectly in any public meeting;
(iii)they shall desist from giving any interview to any media - audio and video - or by issuing any press statement encouraging or supporting terrorist organizations, more particularly LTTE or furthering their activities;
(iv) if they hold passport, they shall deposit the same with the trial Court;
(v) they shall not make any attempt to contact any of the prosecution witnesses, directly or through any other person, or in any other way try to tamper with the evidence or influence any witness in this case or any other case against them or any other crime under investigation by any government agency;
(vi) the appellants shall cooperate for the early completion of the trial and shall attend the hearings;
(vii) they shall also be available for interrogation and shall not abscond;
(viii)they shall also attend all the hearings before the trial Court regularly without impeding the progress of the trial; and
(ix) they shall intimate the place of their residence and shall not change the same without prior intimation to the respondent of their intention to shift elsewhere.

In the result, the criminal appeal is allowed with the conditions stated above.

Index : Yes
Internet : Yes

sasi/dpn/kpl

To:

1. The Special Court (POTA)
Poonamalle, Chennai-56.

2. The Public Prosecutor
High Court, Chennai.

3. The State of Tamilnadu rep.
by Deputy Superintendent of Police
'Q' Branch C.I.D.
Kalaimagal Nagar
Madurai-625 017.

Crl.A.No.1397 of 2003
P.D.DINAKARAN,J
AND
C.NAGAPPAN,J.

(Order of this Court made by P.D.DINAKARAN,J.)

Considering the nature of charges framed against the appellants and the evidence to be adduced by the prosecution, we direct the Special Court to complete the trial on day-to-day basis and pronounce the judgment in accordance with law, on or before 30.6.2004.

We also make it clear that if any of the conditions referred to above is violated, it is open to the parties to move this Court for necessary orders.

(P.D.D.J.)(C.N.J.)
12.01.2004

kpl

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